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June 14, 2006

Honorable Edward Korman
United States District Court
United States Courthouse
225 Cadman Place East
Brooklyn, NY 11201

Re: In re Holocaust Victim Assets Litigation

Dear Chief Judge Korman:

I write, at your direction, to respond to the May 15, 2006 letter from Burt Neuborne to yourself asking you to remove me as Class Settlement Counsel. I oppose his request.

At the outset, it appears the timing of Mr. Neuborne's request is to prejudice the only two matters which are actively being litigated and briefed by me on behalf of the Class: 1) Mr. Neuborne's $5.6 million fee application, and 2) a cross-petition for certiorari pending in the United States Supreme Court. In the first, Mr. Neuborne is opposed to the Class' position for his own gain; in the second, he is opposed to several hundred thousand Class members receiving a *cy pres* award. Action by this Court granting Mr. Neuborne's request will necessarily result in unnecessary satellite litigation in the courts handling those matters.

In addition, Mr. Neuborne's attempt to connect me with Mr. Fagan at this juncture is pure smear. Mr. Fagan is in the final phase of a New Jersey disbarment proceeding, has been inactive in the instant litigation for several years, and has been out of communication with me. If Mr. Neuborne wants to cleanse Settlement Class Counsel, he should consider removal of Milberg Weiss which is under federal indictment. Milberg Weiss reviewed and advised Mr. Neuborne on his fee application and, in Milberg Weiss' recent fee application, sought compensation for its work on Neuborne's fee application.

I. The Role of Class Counsel in this Litigation

I served as Co-Chair of the Plaintiffs' Executive Committee in this litigation because of my demonstrated skills in litigating and settling major national and international cases, including Alien Tort Claim Act cases and litigation against the Swiss banks. I played a major, not

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"constructive," role in the litigation and negotiation of the $1.25 billion settlement. *See generally* S.E. Eizenstat, Imperfect Justice (Public Affairs 2003). Mr. Neuborne, in a March 2006 Declaration, touts me as the principal draftsman of the Settlement Agreement. In early 1997, when Mr. Neuborne joined the litigation as plaintiffs' counsel, he demanded that if he disagreed with Class Counsel on any issue he be able to file a separate brief. In fact, he did this on at least two occasions and never disclosed to me in advance the substance of his briefs. This Court never questioned or struck Mr. Neuborne's briefs. Thus, there has been a tradition in this case of Class Counsel taking different positions on behalf of the Class.

During the litigation phase of the case, there were frequent meetings and telephone conferences of Class Counsel to exchange views, develop strategy and achieve consensus.

II. The Settlement Phase

During the seven years beginning with the appointment of Mr. Neuborne as Lead Settlement Counsel, there was virtually no communication among all Settlement Class Counsel. No meetings or conference calls of all counsel were held. Indeed, his time records are bereft of any such references. Unless I was served with papers by opposing counsel, I usually did not see motions and appellate briefs because Mr. Neuborne failed to forward copies. As has only recently been disclosed by Mr. Neuborne, he had a secret agreement with this Court for compensation. That was never disclosed to Class members or Settlement Counsel. Nor did he ever disclose his role – or his conflict -- in acting as "general counsel" to this Court. Apparently his failure to delegate tasks to co-counsel (especially co-counsel like myself who was acting *pro bono* as to fees and expenses from November 2000 to the present) was due to his profit motive. Nonetheless, on the two occasions when Mr. Neuborne requested me to prepare declarations regarding the settlement, I did so. Likewise, I met with and urged dissident Class members to dismiss their appeals.

I was troubled in the early years by Mr. Neuborne's lack of experience in administering a large settlement and his inability reach amicable solutions on documents with counsel for the Swiss banks in addition to his inability to drive consensus and communicate with Class counsel. However, I did nothing to undermine his role or credibility because I assumed he was acting in the best interest of all class members. This assumption changed when I read the Second Circuit's decision in *In re Holocaust Victim Assets Litigation,* 2001 WL 868507, *2 (2d Cir. 7/26/01)(the lower court need not distribute money to the Looted Assets Subclass on a claims-made basis). In that decision the Court relied on Mr. Neuborne's representation that the Looted Assets Subclass could recover for property claims in the German Compact. Since I had negotiated the property provisions of the German Compact, I knew that representation to be false. (Property claims were limited 1) in amount, 2) to banking and insurance claims, and 3) to persons who heretofore were prevented from making such claims). Mr. Neuborne never served me with his appellate brief so I was uninformed of the position he was taking.

As a result, I felt a duty to advocate an egalitarian approach to the *cy pres* distribution of $800 million – which was the amount I believed would remain after distribution to the Deposited Assets Class. Acting entirely *pro bono*, I submitted a position paper to the Court regarding *cy pres* distribution. When that was rejected and objectors took an appeal, I submitted a brief in the

Court of Appeals asking that this Court's decision as to the amount distributed ($60 million) be affirmed but remanded with directions that this Court make no further piecemeal *cy pres* awards until a comprehensive *cy pres* plan is approved. Rather than welcoming this brief, Mr. Neuborne moved to strike it. The Court of Appeals rejected Mr. Neuborne's motion. The Court of Appeals affirmed this Court's decision based on the exceptional circumstances of this case without citing to its own precedent of *In re Agent Orange*, 818 F.2d 179 (2nd Cir. 1987) or setting forth criteria for future *cy pres* awards. The Court of Appeals did suggest that I seek from this Court a cessation of piecemeal *cy pres* awards until a comprehensive plan is approved.

Although I plan to follow the Court of Appeals' suggestion, the filing of a petition for certiorari by certain objectors presented an opportunity for the Class to achieve clarity of the standards appropriate for a *cy pres* distribution. Accordingly, I drafted and submitted a cross petition for certiorari raising that issue. Once again, Mr. Neuborne opposed that petition.

III. Mr. Neuborne's Grievances

Mr. Neuborne cites a litany of grievances, none of which support depriving the Class of my *pro bono* services:

1. **Opposition to Basic Structure of Settlement** – To the contrary, I created and negotiated (with others) the basic structure of the settlement. I have responsibly advocated to the Court how to implement that structure and allocate funds based on the negotiated sub-amounts.

2. **Opposition to the Court's Settlement Procedures** – Based on my considerable experience in class action settlements, I advocated a secular and streamlined approach to distribution in order to give money to claimants as soon as possible. For example, I asked the Court to "take possession of the distribution process," meaning to be "hands-on." Based on my visit to the CRT in Zurich, I advocated discharging the judges and handling claims administratively. The Court ultimately followed this advice but only after years of delay and excessive cost. I also advocated not using NGO's in the administration and distribution of money; and of a secular audit. The Court did not follow this advice. The siphoning of money by Israel Singer and his near-indictment demonstrates the prescience of this advice.

3. **Opposition to Allocation to the Deposited Assets Class** -- I initially advocated distributing to the Deposited Assets Class the higher amount negotiated in the settlement -- $100 million – based on my knowledge from the litigation that few claimants had even minimal evidence of a confiscated Swiss bank account. The Court rejected this and allocated $200-800 million. After five years of delayed CRT proceedings (and the death of many Holocaust survivors who could have benefited from a *cy pres* distribution), I advocated capping the Deposited Assets at $200 million and creating a comprehensive *cy pres* distribution plan. This is not inconsistent with the fair representation of the Deposited Assets Class since 1) $200 million is double the amount negotiated with the Swiss banks on their behalf and 2) generous legal presumptions permit payments to persons lacking probative evidence. Capping would free distribution of the remainder of the monies.

4. Advocating a Secular Approach to Administration -- Guilty as charged for the reasons stated in 2, above. The Federal Court is a secular institution and the administration of a federal court settlement should eschew employing and paying groups because of their particular religious affiliation. In addition, many of my Jewish clients claimed the NGO's had served them badly.

5. **Conflicted under Amchem and Fibreboard** -- I have consistently advocated fairness for each subclass and the Class as a whole. I have advocated a faster and egalitarian distribution. The person with a conflict is Mr. Neuborne (or any other Class counsel) who has abandoned the hundreds of thousands of members of the Looted Assets Subclass and represented the Court as its general counsel.

6. **Rogue Settlement Counsel** -- Neither Rule 23 nor the Manual on Complex Litigation require that there be a single position of class counsel. It is not unusual for class counsel to disagree on issues and to present more than one position to a court. I have never represented that I speak for all class counsel. For example, in my Court of Appeals brief I stated: "The position of the Class as represented by the undersigned, is different from the position of the Court-appointed Settlement Lead Counsel, Burt Neuborne." The Rules of Professional Conduct require "zealous" advocacy which, in turn, promotes more reasoned court decisions. Mr. Neuborne wishes to silence (and demean) any advocacy other than his own. Whether or not the Court values my advocacy, I refuse to become a sycophant touting parochial advice because it serves my financial interest.

Mr. Neuborne obliquely charges anti-semitism on my part because I advocated the use of non-Jewish auditors to review whether the Court's million-dollar payments to Jewish NGO's resulted in the services contracted for. I deeply resent the implication. I have made a career of representing many of the world's downtrodden regardless of race, creed or religion – and have been a pioneer in human rights jurisprudence. I currently represent many Jewish victims of suicide bombings in Israel seeking compensation for them and their heirs. An anti-semite does not travel to the Middle East – as I do -- taking on terrorist sympathizers to vindicate the rights of Jews.

In conclusion, Mr. Neuborne's request is ill-founded, mean-spirited and intended to influence two pending matters – one of which where he has a strong financial interest. I continue to serve a constructive role as *pro bono* class counsel zealously advocating for the entire class.

Respectfully yours,

Robert A. Swift

RAS/pdw

Cc w/enc.: All Class Counsel